A

Re Far Origin Sdn Bhd (in liquidation)

B HIGH COURT (IPOH) — POST-WINDING-UP SUIT NO AA-28PW-40–03 OF 2024
MOSES SUSAYAN JC
12 MARCH 2025

C *Companies and Corporations — Liquidators — Action against liquidator — Application for leave — Allegations of impropriety and mismanagement against liquidator — Whether res judicata applied — Whether applicant estopped from raising issues of irregularities — Whether leave should be granted pursue legal action against liquidator*

D

The applicant sought leave to initiate proceedings against the liquidator of Far Origin Sdn Bhd ('FOSB'), for allegations of impropriety and mismanagement. The applicant complained that one of the contributories in FOSB, known as Toi Sin Fatt improperly increased his shareholding in FOSB to 315,000 shares and later transferred 11,000 shares to his wife without making any payment. The applicant argued that this act was illegal and void, resulting in pecuniary losses to him. He also contended that the shares were unlawfully issued and transferred without consideration, and the liquidator's confirmation stating that no records of payment for these shares existed to support his claim. Based on this, the applicant asserted that the share transfers should be rectified and declared invalid. The applicant further argued that FOSB held 26 shop lots as a bare trustee under an irrevocable power of attorney ('PA') on behalf of Arena Ria Sdn Bhd ('ARSB'), a company where the applicant held a 40% share. The applicant claimed that the assets belonged to ARSB, and their distribution to FOSB's shareholders would constitute criminal misappropriation. In consequence, the applicant demanded the formation of a Committee of Inspection ('COI') to investigate the alleged share improprieties and asset misappropriation, citing the liquidator's refusal as a failure of fiduciary duty. The applicant also sought directorship in Puspa Sepakat Sdn Bhd, where FOSB was a substantial shareholder, alleging inaction from the liquidator on the matter. Based on these claims, the applicant asserted a prima facie case was established, invoking the court's power to intervene under s 206(3) of the Companies Act 2016. The applicant prayed for leave to commence proceedings to protect his contributory rights and prevent further losses to the company ('FOSB'). The issue that arose for determination was whether leave could be granted for the applicant to pursue legal action against the liquidator.

E

F

G

H

I

Held, dismissing the application with costs:

(1) The legal threshold for leave to sue a liquidator was high. It was designed to prevent vexatious claims while ensuring legitimate grievances were addressed. The courts would only grant leave in exceptional circumstances where clear misconduct or financial harm to the company was proven (see para 23).

(2) The applicant's claims regarding the alleged improprieties of the shareholding in FOSB were untenable. The Court of Appeal had already adjudicated on this issue during the winding up proceedings, where the Court of Appeal ruled that the applicant had no basis to claim unfair dilution of shares as he was offered the right to subscribe additional shares in proportion to his existing holdings but declined to do so. The applicant's failure to appeal this ruling to the Federal Court rendered the matter conclusively settled under the doctrine of res judicata. Accordingly, the applicant was estopped from raising the alleged shareholding irregularities again in a separate proceeding (see paras 26 & 31).

(3) Pursuant to s 25(2) and para 11 of the Schedule to the Courts of Judicature Act 1964, the court could dismiss proceedings where the matter was res judicata. As the Court of Appeal had already ruled on the issue raised by the applicant, the matter was conclusively settled. Consequently, the applicant had failed to establish a prima facie case or demonstrate any pecuniary loss. Therefore, there was no grounds to grant leave for the applicant to commence an action against the liquidator (see para 32).

(4) A PA could not be deemed irrevocable if valuable consideration was not proven. Here, the applicant had failed to provide substantive evidence of such consideration beyond a mere recital in the document. Furthermore, a PA ceased to have legal effect upon the winding up of both the donor and the attorney. Since both FOSB and ARSB were under liquidation, any rights purportedly granted by the PA had become legally ineffective. A PA also did not confer proprietary rights, is merely an instrument delegating authority and did not in itself transfer ownership. Since the liquidator of ARSB had not asserted any ownership rights over the properties, the applicant's attempt to independently pursue the claim was legally untenable. Furthermore, as the liquidator of ARSB was the only proper party to assert any ownership claim over the shop lots, the applicant lacked the legal standing to bring this matter before the court (see paras 34–36 & 40–41).

(5) The applicant had not demonstrated the necessity of forming a COI in FOSB's liquidation. The applicant's request for a COI to investigate alleged improprieties in FOSB's shareholding was barred by res judicata. Furthermore, a COI was not an automatic right but a discretionary measure to be summoned upon the request of a contributory or creditor.

Such a request was made, and a vote was held among the creditors and contributories of FOSB. However, the majority of creditors and contributories opposed its formation. In accordance with r 119 of the Companies (Winding-Up) Rules 1972, a resolution was deemed passed when a majority in both number and value vote in favour of the decision. In this case, the decision against the formation of a COI was validly made and was binding (see paras 43–44).

(6) The liquidation of FOSB was a solvent winding up with only three creditors and five contributories. A COI was typically necessary in cases involving a large number of creditors, making it impractical for all to participate in liquidation proceedings. Given the small number of stakeholders in this case, forming a COI would serve no practical purpose. The applicant's primary reason for seeking the formation of a COI related to allegations of improprieties in the allotment and transfer of shares in FOSB. However, these allegations have already been litigated and did not constitute valid grounds to revisit the issue through a COI (see paras 46–47).

(7) The applicant had failed to establish any legal or factual basis to compel the liquidator of FOSB to remove a director of PSSB and appoint the applicant in their place. Section 206(3) of the Companies Act 2016, which the applicant relied on, merely prescribed the procedural requirement of issuing a special notice and passing a resolution for the removal or appointment of a director. It did not, in any way, grant the liquidator unilateral authority to effect such changes in PSSB's board of directors. The applicant had not provided any justification for why his appointment to PSSB is necessary to safeguard FOSB from pecuniary losses, an essential criterion for obtaining leave to initiate legal proceedings against the liquidator. In the absence of any legal duty on the liquidator to act in the manner sought and given the lack of evidence of financial harm to FOSB, there was no merit in the applicant's request (see para 50).

(8) The claim that FOSB, as the largest shareholder in PSSB, held the right to dictate director appointments was incorrect. FOSB held an equal number of shares as another company, ZKS Serangkai Sdn Bhd, and did not have a controlling interest. As there was no prima facie evidence of mismanagement or financial harm to FOSB, the court dismissed the applicant's request, reaffirming that the liquidator had no obligation to interfere in PSSB's directorial affairs (see paras 51–52).

(9) The liquidator's conduct in the management of the company had been consistent with statutory requirements. The applicant had failed to provide credible evidence of bad faith, misconduct, or pecuniary loss to

the company. The integrity of the liquidation process ought to be protected so that liquidators could discharge their duties without undue interference (see para 57).

[Bahasa Malaysia summary

Pemohon telah memohon kebenaran untuk memulakan prosiding terhadap pelikuidasi Far Origin Sdn Bhd ('FOSB'), atas dakwaan salah laku dan salah urus. Pemohon membangkitkan isu bahawa salah seorang penyumbang FOSB, iaitu Toi Sin Fatt, telah secara tidak wajar meningkatkan pegangan sahamnya dalam FOSB kepada 315,000 unit saham dan kemudiannya memindahkan 11,000 unit saham kepada isterinya tanpa sebarang bayaran. Pemohon berhujah bahawa tindakan ini adalah tidak sah dan terbatal, yang mengakibatkan kerugian kewangan kepadanya. Pemohon turut menegaskan bahawa saham tersebut telah dikeluarkan dan dipindahkan secara tidak sah tanpa balasan, dan pengesahan pelikuidasi bahawa tiada rekod pembayaran bagi saham-saham tersebut wujud telah menyokong penyataannya. Berdasarkan perkara tersebut, pemohon menuntut supaya pemindahan saham tersebut diperbetulkan dan diisytiharkan tidak sah. Seterusnya, pemohon berhujah bahawa FOSB memiliki 26 unit lot kedai sebagai pemegang amanah kosong di bawah suatu surat kuasa wakil yang tidak boleh ditarik balik ('SKW tersebut') bagi pihak Arena Ria Sdn Bhd ('ARSB'), sebuah syarikat di mana pemohon memegang 40% saham. Pemohon mendakwa bahawa aset tersebut adalah milik ARSB, dan pengagihannya kepada para pemegang saham FOSB akan merupakan suatu salah guna harta jenayah. Sehubungan itu, pemohon menuntut supaya suatu Jawatankuasa Siasatan ('JS') dibentuk bagi menyiasat dakwaan penyelewengan saham dan salah guna aset tersebut, dengan alasan bahawa kegagalan pelikuidasi untuk berbuat demikian adalah satu kelalaian terhadap tanggungjawab fidusiari. Pemohon turut menuntut kedudukan sebagai pengarah dalam Puspa Sepakat Sdn Bhd, sebuah syarikat di mana FOSB merupakan pemegang saham utama, dengan mendakwa bahawa pelikuidasi gagal mengambil tindakan dalam perkara tersebut. Berdasarkan keseluruhan dakwaan ini, pemohon menegaskan bahawa wujudnya suatu kes prima facie, yang membolehkan campur tangan mahkamah di bawah s 206(3) Akta Syarikat 2016. Pemohon kemudiannya memohon kebenaran untuk memulakan prosiding bagi melindungi haknya sebagai penyumbang serta mengelakkan kerugian lanjut kepada syarikat ('FOSB'). Persoalan yang timbul untuk ditentukan adalah sama ada kebenaran boleh diberikan kepada pemohon untuk meneruskan tindakan undang-undang terhadap pelikuidasi.

Diputuskan, menolak permohonan dengan kos:

(1) Had undang-undang bagi pemberian kebenaran untuk menyaman seorang pelikuidasi adalah tinggi. Prinsip ini digubal bagi menghalang tuntutan yang remeh dan menyusahkan, sambil memastikan tuntutan yang sah dapat diberikan ruang yang sewajarnya. Mahkamah hanya akan

memberikan kebenaran dalam keadaan yang luar biasa, di mana salah laku yang nyata atau kerugian kewangan kepada syarikat dapat dibuktikan (lihat perenggan 23).

(2) Tuntutan pemohon mengenai ketidakaturan pemegangan saham dalam FOSB adalah tidak berasas. Isu ini telahpun diputuskan oleh Mahkamah Rayuan dalam prosiding penggulungan, di mana mahkamah memutuskan bahawa pemohon tidak mempunyai asas yang sah untuk mendakwa berlaku penjualan saham yang tidak adil memandangkan dia telah ditawarkan hak untuk membeli saham tambahan mengikut kadar pegangan sedia ada tetapi memilih untuk tidak berbuat demikian. Kegagalan pemohon untuk meneruskan rayuan ke Mahkamah Persekutuan menyebabkan keputusan tersebut menjadi muktamad dan mengikat di bawah doktrin res judicata. Justeru, pemohon telah diestop daripada membangkitkan semula dakwaan mengenai ketidakaturan pemegangan saham dalam prosiding baharu ini (lihat perenggan 26 & 31).

(3) Selanjutnya, menurut s 25(2) dan perenggan 11 Jadual kepada Akta Mahkamah Kehakiman 1964, mahkamah mempunyai kuasa untuk menolak prosiding yang res judicata. Oleh kerana Mahkamah Rayuan telahpun membuat keputusan muktamad terhadap isu yang dibangkitkan oleh pemohon, perkara ini telah diselesaikan secara muktamad. Maka, pemohon telah gagal mewujudkan suatu kes prima facie atau membuktikan sebarang kerugian kewangan yang ditanggung. Sehubungan itu, tiada alasan untuk membenarkan permohonan bagi mendapatkan kebenaran memulakan tindakan terhadap pelikuidasi (lihat perenggan 32).

(4) Sesuatu surat kuasa wakil ('SKW') tidak boleh dianggap sebagai tidak boleh dibatalkan ('irrevocable') sekiranya balasan bernilai tidak dibuktikan. Dalam kes ini, pemohon telah gagal mengemukakan keterangan substantif mengenai wujudnya balasan tersebut selain daripada pernyataan dalam dokumen berkenaan. Selanjutnya, sesuatu SKW terhenti daripada berkuat kuasa secara sah apabila kedua-dua pihak, iaitu pemberi kuasa ('donor') dan penerima kuasa ('attorney') digulungkan. Memandangkan FOSB dan ARSB kedua-duanya telah berada dalam likuidasi, sebarang hak yang kononnya diberikan melalui SKW tersebut telah menjadi tidak berkesan di sisi undang-undang. Tambahan pula, SKW tidak memberikan hak milikan harta, sebaliknya hanyalah suatu instrumen pengagihan kuasa dan tidak dengan sendirinya memindahkan pemilikan. Oleh kerana pelikuidasi ARSB tidak pernah menuntut sebarang hak milikan terhadap hartanah tersebut, cubaan pemohon untuk menuntut secara bersendirian adalah tidak berasas di sisi undang-undang. Tambahan lagi, memandangkan hanya pelikuidasi ARSB yang merupakan pihak yang sah untuk mengemukakan tuntutan

hak milikan ke atas lot-lot kedai tersebut, pemohon tidak mempunyai locus standi untuk membawa perkara ini ke hadapan mahkamah (lihat perenggan 34–36 & 40–41).

(5) Pemohon tidak telah membuktikan keperluan bagi pembentukan Jawatankuasa Siasatan ('JS') dalam proses penggulungan FOSB. Permohonan bagi pembentukan JS untuk menyiasat dakwaan ketidakaturan dalam pemegangan saham FOSB telah terhalang oleh prinsip res judicata. Selain itu, JS bukanlah suatu hak automatik tetapi merupakan langkah budi bicara yang boleh dibentuk atas permintaan seorang penyumbang modal atau pemiutang. Permintaan sedemikian telah dibuat, dan suatu pengundian telah dijalankan di kalangan pemiutang dan penyumbang modal FOSB. Namun begitu, majoriti pemiutang dan penyumbang modal telah menentang pembentukan tersebut. Selaras dengan keterangan k 119, Kaedah Syarikat (Penggulungan) 1972, sesuatu ketetapan telah dianggap diluluskan apabila majoriti bilangan dan nilai mengundi menyokong keputusan tersebut. Dalam kes ini, keputusan menolak pembentukan COI telah dibuat secara sah dan adalah mengikat (lihat perenggan 43–44).

(6) Penggulungan FOSB merupakan suatu penggulungan solven dengan hanya tiga orang pemiutang dan lima orang penyumbang modal. JS lazimnya diperlukan dalam kes-kes yang melibatkan bilangan pemiutang yang ramai sehingga menyukarkan kesemua pihak untuk mengambil bahagian dalam prosiding penggulungan. Memandangkan bilangan pihak berkepentingan dalam kes ini adalah kecil, pembentukan JS tidak akan membawa sebarang tujuan praktikal. Alasan utama pemohon bagi memohon pembentukan JS berkaitan dengan dakwaan ketidakaturan dalam peruntukan dan pemindahan saham FOSB. Namun demikian, dakwaan tersebut telah pun diputuskan melalui proses litigasi dan tidak membentuk alasan yang sah untuk membangkitkan semula isu tersebut melalui JS (lihat perenggan 46–47).

(7) Pemohon telah gagal mewujudkan sebarang asas perundangan atau fakta bagi memaksa pelikuidasi FOSB untuk menyingkirkan seorang pengarah PSSB dan melantik pemohon sebagai pengganti. Seksyen 206(3) Akta Syarikat 2016, yang dirujuk oleh pemohon, hanyalah memperuntukkan keperluan prosedur iaitu pemberian notis khas dan kelulusan sesuatu ketetapan mengenai penyingkiran atau pelantikan pengarah. Peruntukan tersebut sama sekali tidak memberi kuasa unilateral kepada pelikuidasi untuk melaksanakan perubahan sedemikian dalam lembaga pengarah PSSB. Pemohon juga tidak mengemukakan sebarang justifikasi mengapa pelantikan beliau ke dalam PSSB adalah diperlukan bagi melindungi FOSB daripada kerugian kewangan, sedangkan perkara ini merupakan kriteria penting untuk mendapatkan kebenaran memulakan prosiding terhadap pelikuidasi.

Ketiadaan sebarang kewajipan undang-undang ke atas pelikuidasi untuk bertindak sebagaimana yang dipohon, serta ketiadaan keterangan yang menunjukkan kerugian kewangan kepada FOSB, menyebabkan permohonan pemohon tidak mempunyai sebarang merit (lihat perenggan 50).

(8) Dakwaan bahawa FOSB, selaku pemegang saham terbesar dalam PSSB, mempunyai hak untuk menentukan pelantikan pengarah adalah tidak benar. FOSB memegang jumlah saham yang sama dengan sebuah lagi syarikat, iaitu ZKS Serangkai Sdn Bhd, dan tidak mempunyai kepentingan mengawal. Memandangkan tiada keterangan prima facie mengenai salah urus atau kerugian kewangan terhadap FOSB, mahkamah menolak permohonan pemohon dan menegaskan bahawa pelikuidasi tidak mempunyai kewajipan untuk mencampuri urusan pengarah dalam PSSB (lihat perenggan 51–52).

(9) Tindakan pelikuidasi dalam pengurusan syarikat adalah selaras dengan kehendak statutori. Pemohon telah gagal mengemukakan keterangan kukuh mengenai niat jahat, salah laku, atau kerugian kewangan terhadap syarikat. Integriti proses penggulungan wajib dilindungi agar pelikuidasi dapat melaksanakan tanggungjawab mereka tanpa campur tangan yang tidak wajar (lihat perenggan 57).]

Cases referred to

AA Sawit Sdn Bhd v Stable-Win Sdn Bhd [2014] MLJU 1953; [2014] CLJU 667; [2014] AMEJ 0766; [2014] MLRHU 222, HC (refd)

Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor [2007] 5 MLJ 685; [2007] 10 CLJ 7, HC (refd)

Affluent Freight Sdn Bhd v Sumathi a/p K Appukuttan Pillai & Anor [2001] MLJU 635; [2001] 8 CLJ 71; [2001] AMEJ 0252; [2001] 4 MLRH 29, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 AMR 2559, SC (refd)

Chan Thiam Teng v Ban Swee Heng Sdn Bhd [1992] 2 MLJ 583; [1992] CLJU 37; [1992] 4 MLRH 277, HC (refd)

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204; [1995] 4 CLJ 11; [1995] 3 AMR 2630, CA (refd)

Firstcrest Global Limited & Ors v Indexia Assets and another appeal [2006] 5 MLJ 723; [2006] 2 MLRA 1; [2006] 3 CLJ 860; [2006] 5 AMR 304, CA (refd)

Ganda Setia Cemerlang Sdn Bhd dan satu lagi lwn Maika Holdings Bhd [2017] MLJU 158; [2017] MLRAU 419, HC (refd)

Lawlor v Gray [1984] 3 All ER 345, Ch D (refd)

Lim Boon Chuan @ Lim Ban Huat v Wonderful Castle Sdn Bhd (in liquidation)

& Anor [2019] 1 MLJ 270; [2019] 1 CLJ 65; [2018] 6 MLRA 372, CA (refd)

N Chanthiran a/l Nagappan v Kao Che Jen [2023] 5 MLJ 284; [2023] 7 CLJ 677; [2023] 6 AMR 73; [2023] 5 MLRA 247, FC (refd)

Ngadi bin Apandi v Mohamad Ali bin Md Ahsan & Ors [2016] MLJU 1548; [2017] 3 AMR 83; [2016] CLJU 1743; [2016] MLRHU 1548, HC (refd)

OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544; [1997] 2 CLJ 534; [1995] 1 MLRA 611, CA (refd)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 1 MLRA 687; [2012] 2 CLJ 501, FC (refd)

Sarawak Timber Industry Development Corp v Borneo Pulp Plantation Sdn Bhd [2005] 2 MLJ 74; [2004] 8 CLJ 584; [2004] AMEJ 0097; [2004] 2 MLRH 749, HC (refd)

See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [2010] 1 MLJ 547; [2009] 8 AMR 776; [2009] 5 MLRH 462, HC (refd)

Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd) [2020] 6 MLJ 168; [2020] 4 CLJ 841; [2020] 2 MLRA 295, FC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 119
Companies Act 1965 (repealed by Companies Act 2016) s 236(3)
Companies Act 2016 ss 206(3), 486(2)
Courts of Judicature Act 1964 s 25(2), Schedule, para 11

Domnic Selvam Gnanapragasam (Domnic Pragasam Tan & Co) for the applicant.
Lee Boon Koon (Arissa Tan Chien & Co) for the liquidator/respondent.

Moses Susayan JC:

INTRODUCTION

[1] The applicant (Dato' Suki Mee) seeks leave to initiate proceedings against the liquidator of Far Origin Sdn Bhd ('FOSB'), for allegations of impropriety and mismanagement. In this respect, the applicant demands court intervention. However, the liquidator opposes the applicant's request for leave to commence proceedings against the liquidator, arguing that the applicant has failed to meet the legal threshold for such an application. The question for determination for this court is whether leave can be granted for the applicant to pursue legal action against the liquidator.

A BACKGROUND FACTS

[2] The applicant alleges impropriety and mismanagement. The applicant complains that one of the contributories in FOSB, known as Toi Sin Fatt improperly increased his shareholding in FOSB to 315,000 shares and later transferred 11,000 shares to his wife, Ng Yok Fong, without making any payment. The applicant argues that this act was illegal and void, resulting in pecuniary losses to him. He contends that the shares were unlawfully issued and transferred without consideration, and the liquidator's confirmation on 28 February 2024 stating that no records of payment for these shares exist supports his claim. Based on this, the applicant asserts that the share transfers should be rectified and declared invalid.

[3] The applicant also argues that FOSB holds 26 shop lots as a bare trustee under an irrevocable power of attorney ('PA') on behalf of Arena Ria Sdn Bhd ('ARSB'), a company where the applicant holds a 40% share. The applicant claims that the assets belong to ARSB, and their distribution to FOSB's shareholders would constitute criminal misappropriation.

[4] Further, the applicant demands the formation of a Committee of Inspection ('COI') to investigate the alleged share improprieties and asset misappropriation, citing the liquidator's refusal as a failure of fiduciary duty. The applicant also seeks directorship in Puspa Sepakat Sdn Bhd, where FOSB is a substantial shareholder, alleging inaction from the liquidator on the matter. Based on these claims, the applicant asserts a prima facie case is established, invoking the court's power to intervene under s 206(3) of the Companies Act 2016. The applicant prays for leave to commence proceedings to protect his contributory rights and prevent further losses to the company ('FOSB').

RESPONDENT'S SUBMISSION

[5] The respondent opposes the applicant's request for leave to commence proceedings against the liquidator of FOSB on several grounds. Firstly, the respondent asserts that the applicant has failed to establish a prima facie case or demonstrate pecuniary loss to FOSB, as required under *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 1 MLRA 687; [2012] 2 CLJ 501. The allegations of impropriety in shareholding, specifically the issuance and transfer of 315,000 shares, were adjudicated during the winding up proceedings, and the Court of Appeal found no basis for the applicant's claims. Therefore, the respondent submits that the doctrine of res judicata bars this matter and cannot be revisited.

[6] Secondly, the respondent contends that the formation of COI is unwarranted. Most creditors and contributories opposed the COI's formation,

deeming it unnecessary given FOSB's solvency and the limited number of stakeholders. The respondent also submits that a COI would add unnecessary delays and costs to the liquidation process. Furthermore, the liquidator has already addressed the alleged share improprieties and provided relevant records, rendering a COI redundant.

[7] Regarding the applicant's claim that 26 shoplots belong to ARSB under a PA, the respondent argues that the PA does not confer ownership of these assets to ARSB. The liquidator of ARSB confirmed that the assets belong to FOSB, and the respondent asserts that transferring them would result in losses to FOSB. The applicant's claims are, therefore, unfounded and procedurally improper.

[8] In challenge of the applicant's request to be appointed director in Puspa Sepakat Sdn Bhd ('PSSB'), the respondent states that FOSB, as a minority shareholder in PSSB, has no authority to appoint directors, and the applicant has not demonstrated how such an appointment would benefit FOSB.

[9] The respondent submits that the applicant's application lacks merit and is an attempt to relitigate resolved issues. The respondent contends that the liquidator has acted in accordance with his statutory duties, and the applicant has not provided sufficient evidence to warrant the court's intervention.

[10] Upon reviewing the submissions by both parties, this court finds in favour of the respondent and its liquidator. The applicant, has failed to meet the threshold requirement for obtaining leave to commence proceedings against the liquidator, as established in *Ooi Woon Chee*.

LAW ON LEAVE TO COMMENCE ACTION ON THE LIQUIDATOR

[11] The law governing the requirement of leave to commence action against a liquidator has been firmly established in a number of cases through the years by the Malaysian courts. The recent decision of the Federal Court in *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284; [2023] 7 CLJ 677; [2023] 6 AMR 73; [2023] 5 MLRA 247 reaffirmed this position that leave of court is a necessary prerequisite for any legal proceedings against a court-appointed liquidator. The rationale for this requirement is twofold:

(a) to protect liquidators, who are officers of the court, from vexatious or frivolous litigation, and

(b) to ensure an orderly and efficient winding up process without unnecessary legal disruptions.

[12] The test for granting leave was established in *Ooi Woon Chee*, which requires that the applicant:

(a) demonstrates a prima facie case;

(b) establishes pecuniary loss to the wound up company; and

(c) the prima facie requirement serves as a filter to prevent baseless claims, as reaffirmed in *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685; [2007] 10 CLJ 7.

[13] The Federal Court in *N Chanthiran* reaffirmed that leave of the winding up court is required before commencing proceedings against a court-appointed liquidator. It commented that the Court of Appeal had wrongly interpreted s 486(2) of the Companies Act 2016, concluding that leave was unnecessary because the section did not explicitly mention it. However, the Federal Court ruled that the phrase 'subject to the control of the court' in s 486(2) implicitly required leave, aligning with the long-standing common law principle. The court emphasised that liquidators are officers of the court, and any claims against them must be scrutinised to prevent vexatious and frivolous litigation that could interfere with the winding up process. Citing *Ooi Woon Chee & Anor*, the court held that the prima facie standard applies, meaning an applicant must show sufficient merit and potential pecuniary loss to proceed. Consequently, the appeal was allowed, affirming that leave is mandatory before suing a court-appointed liquidator. The court held:

> The phrase 'subject to the control of the court' in s 486(2) essentially meant that a liquidator was answerable to the court in the performance of his duties. Once the liquidator was sanctioned by the court to perform his duties, no party could interfere with him save with the permission of the winding up court.

[14] Before granting leave, the winding up court must be satisfied that the claim has a reasonable prospect of success. In *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204; [1995] 4 CLJ 11; [1995] 3 AMR 2630, the Court of Appeal, when interpreting s 236(3) of the Companies Act 1965, emphasised that:

> ... it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of court is needed before an action is commenced against him and officers like him.

[15] Section 236(3) of the Companies Act 1965 is pari materia with s 486(2) of the Companies Act 2016, which provides:

> 486 Powers of liquidator in winding up by Court
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or

contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[16] In *Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168; [2020] 4 CLJ 841; [2020] 2 MLRA 295, the Federal Court reiterated that courts must protect the integrity of the liquidation process by ensuring only meritorious claims proceed.

[17] Thus, Malaysian courts have consistently maintained a stringent approach in granting leave, emphasising that a liquidator cannot be subjected to unwarranted litigation unless clear evidence of misconduct or pecuniary loss is demonstrated.

[18] The requirement to obtain leave before commencing proceedings against a liquidator is a fundamental safeguard in corporate insolvency law. Liquidators, as court-appointed officers, must be able to perform their statutory duties without undue interference. The Federal Court in *Ooi Woon Chee & Anor* established two essential criteria for granting leave:

(a) the existence of a prima facie case, meaning the claim must have legal merit; and

(b) pecuniary loss to the wound-up company, requiring proof that the company has suffered or will suffer financial harm due to the liquidator's actions.

[19] His Lordship Justice Zulkefli CJ (Malaya) in *Ooi Woon Chee* states the two essential criteria in these words:

> [11] *for leave to be granted to proceed with the 505 Suit pecuniary loss must be shown*, otherwise the action would be a waste of time and costs. On this point in the case of *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685; [2007] 10 CLJ 7 it was held that in an application for leave to commence proceedings for, inter alia, breach of duty against a liquidator, it is necessary to prove pecuniary loss to the company.
>
> ...
>
> [15] In order to succeed for the granting of leave the majority contributories must also make out a prima facie case, a standard to protect the court's officer and the winding up process (see the cases of *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685; [2007] 10 CLJ 7; *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567; [1995] 5 MLRH 110; [1995] 1 LNS 320 and *Sarawak Timber Industry Development Corp v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 2 MLRH 749; [2004] 8 CLJ 584). These cases show that in applying the test the court is compelled to evaluate the

evidence led to determine whether the test is met. In *Mamone & another v Pantzer* [2001] ACSR 743, it was held that prospective litigant must, to obtain leave, demonstrate its claim has sufficient merit.

[20] I may also add here that requirement to obtain leave applies not only to court-appointed liquidators but also in cases where liquidators are appointed in companies that have been voluntarily wound up. In *Ganda Setia Cemerlang Sdn Bhd dan satu lagi lwn Maika Holdings Bhd* [2017] MLJU 158; [2017] MLRAU 419, the respondent was voluntarily wound up by its members, Justice Mary Lim (as Her Ladyship then was) emphasised this requirement of leave, stating:

> [14] In law, a company may be wound up either by the court or voluntary by the company itself — see s 211 of Division 1. Once a company has been wound up by the court, or once the winding up court has appointed a provisional liquidator, s 226(3) mandates that leave of the winding up court must be procured either before an action or proceeding is commenced or if already commenced, proceeded with.
>
> [15] Where the company is wound up voluntarily, and that may be by special resolution of the company, or due to the expiration of the duration of the company fixed either in its memorandum or articles of association and a general resolution has been passed to that effect (see s 254) or even on grounds of insolvency and a statutory declaration to that effect has been lodged with the registrar of companies and with the official receiver (see s 255), s 263(2) carries a similar requirement on leave as that found in s 226(3).

[21] To satisfy the prima facie case requirement, the applicant must provide substantive evidence beyond mere allegations. Courts have emphasised that this requirement acts as a filter to prevent speculative claims. In *N Chanthiran Nagappan*, the Federal Court held that claims must demonstrate a reasonable probability of success and not be frivolous. Similarly, see *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547; [2009] 8 AMR 776; [2009] 5 MLRH 462 clarified that mere dissatisfaction with a liquidator's decisions is insufficient, there must be evidence of statutory breach or misconduct.

[22] The pecuniary loss requirement ensures that leave is not granted for personal grievances but only when the company itself has suffered financial harm. In *Abric Project Management Sdn Bhd*, the court held that leave should only be granted where clear evidence shows a negative financial impact on the company. Courts have consistently ruled that personal losses do not justify leave unless directly linked to company losses.

[23] To sum up, the legal threshold for leave to sue a liquidator is high. It is designed to prevent vexatious claims while ensuring legitimate grievances are addressed. Courts will only grant leave in exceptional circumstances where

clear misconduct or financial harm to the company is proven.

[24] In light of the cause papers filed, there is no ambiguity regarding the nature of the application before this court ie whether it seeks leave to commence action against the liquidator, FOSB, or both. Although encl 1 does not explicitly specify this, the applicant's cause papers and submissions clearly indicate that the request pertains to leave to proceed against the liquidator. Accordingly, for the purposes of this judgment, the court's focus will be solely on determining whether leave should be granted for legal proceedings against the liquidator.

[25] Having set out the legal threshold for leave, I will now examine whether the applicant met the requirements.

ISSUE 1: SHARE IMPROPRIETY AND PECUNIARY LOSSES

[26] Upon careful consideration of the submissions and evidence presented by both parties, this court finds that the applicant's claims regarding the alleged improprieties of the shareholding in FOSB are untenable. The Court of Appeal in Civil Appeal No A-02(NCC)(A)-963–05 of 2019 had already adjudicated on this issue during the winding up proceedings, the Court of Appeal ruled that the applicant had no basis to claim unfair dilution of shares as he was offered the right to subscribe additional shares in proportion to his existing holdings but declined to do so. The applicant's failure to appeal this ruling to the Federal Court renders the matter conclusively settled under the doctrine of res judicata.

[27] The principle of res judicata, as expounded in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 AMR 2559 dictates that once a competent court has decided a matter, the same issue cannot be relitigated. The Supreme Court, inter alia, stated the principle as follows:

> [23] What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicature. *When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

[28] The Supreme Court in *Asia Commercial* when further to explain on issue of estoppel, which is applicable in the circumstance of the present case:

> [35] ... the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie. that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision.

[29] Further, the difference between the doctrine of issue estoppel and cause of action estoppel was well articulated by Justice Peter Gibson in *Lawlor v Gray* [1984] 3 All ER 345, who said:

> Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.

[30] In *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; [1997] 2 CLJ 534; [1995] 1 MLRA 611, the Court of Appeal held, inter alia, as follows:

> The plea of res judicata encompasses two distinct forms of estoppel, ie, 'cause of action estoppel' and 'issue estoppel' ... 'Issue estoppel' represents an extension of the doctrine of res judicata to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also 'to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'.

[31] Accordingly, the applicant is estopped from raising the alleged shareholding irregularities again in a separate proceeding.

[32] Pursuant to s 25(2) and para 11 of the Schedule to the Courts of Judicature Act 1964, this court can dismiss proceedings where the matter is res judicata. As the Court of Appeal has already ruled on the issue raised by the applicant, the matter is conclusively settled. Consequently, the applicant has failed to establish a prima facie case or demonstrate any pecuniary loss. Therefore, this court finds no grounds to grant leave for the applicant to commence an action against the liquidator.

ISSUE 2: 26 UNITS OF SHOPLOTS PURPORTEDLY BELONGING TO ARENA RIA SDN BHD

[33] After reviewing the submissions and evidence, this court rules in favour of the respondent and its liquidator regarding the purported irrevocable power of attorney and its alleged conferral of proprietary interest in the disputed shop lots to ARSB.

[34] The applicant contends that the PA was irrevocable, granted valuable consideration, and transferred ownership rights in the 26 shoplots to ARSB. However, the respondent has demonstrated that this assertion lacks both legal and evidentiary support. The case of *Affluent Freight Sdn Bhd v Sumathi a/p K Appukuttan Pillai & Anor* [2001] MLJU 635; [2001] 8 CLJ 71; [2001] AMEJ 0252; [2001] 4 MLRH 29 establishes that a PA cannot be deemed irrevocable if valuable consideration is not proven. Here, the applicant has failed to provide substantive evidence of such consideration beyond a mere recital in the document.

[35] Furthermore, in *Tee Siew Kai*, the Federal Court held that a PA ceases to have legal effect upon the winding up of both the donor and the attorney. Since both FOSB and ARSB are under liquidation, any rights purportedly granted by the PA have become legally ineffective.

[36] The respondent has also successfully argued that a PA does not confer proprietary rights. In *Ngadi bin Apandi v Mohamad Ali bin Md Ahsan & Ors* [2016] MLJU 1548; [2017] 3 AMR 83; [2016] CLJU 1743; [2016] MLRHU 1548, His Lordship Justice Wan Ahmad Farid bin Wan Salleh held that a PA is merely an instrument delegating authority and does not in itself transfer ownership. His Lordship relied on *Firstcrest Global Limited & Ors v Indexia Assets and another appeal* [2006] 5 MLJ 723; [2006] 2 MLRA 1; [2006] 3 CLJ 860; [2006] 5 AMR 304, where the Court of Appeal reaffirmed that a PA does not create a proprietary right independent of an underlying principal agreement. His Lordship said this:

> [19] A power of attorney, no matter how the words therein are couched, does not have a life of its own. It does not confer any proprietary right to the donee. In *Firstcrest Global Limited & Ors v Indexia Assets and another appeal* [2006] 5 MLJ 723; [2006] 2 MLRA 1; [2006] 3 CLJ 860; [2006] 5 AMR 304 (CA), James Foong JCA (as he then was) in delivering the judgment if the Court of Appeal stated the law as follows:
>
> > But it is my view that this instrument (power of attorney) is only a subsidiary document to the sale of shares agreement. Without the sale of shares agreement, which is the principal instrument, the power of attorney cannot subsist. It does not have a life of its own. It is appendant to the sale of shares agreement. So when the principal agreement cannot give proprietary right in law then the power of

attorney, a subsidiary instrument, also confers no such right.

[37] Further, the liquidator of ARSB has confirmed in writing that the PA does not form part of ARSB's official records and that the disputed shop lots are not registered as ARSB's assets. This further undermines the applicant's claim that the properties should revert to ARSB for distribution.

[38] Due to conflicting ownership claims, the court had previously directed the liquidators of both FOSB and ARSB to submit affidavits clarifying the ownership of the 26 shoplots. The court noted discrepancies between ARSB's financial records, where the properties were listed as assets, and the liquidator's position that ARSB had no ownership claim. The liquidator of FOSB complied and submitted an affidavit, supported by financial records and land searches, affirming that the properties belong to FOSB. However, the liquidator of ARSB failed to submit an affidavit, further complicating the ownership determination.

[39] Given that ARSB is under liquidation, its liquidator is the only legally authorised party to assert ownership claims over its assets. Despite the court's explicit directive, the liquidator of ARSB failed to provide an affidavit clarifying the company's claim over the shop lots. As a contributory (shareholder) of ARSB, the applicant lacks locus standi to assert ownership on behalf of ARSB. If ARSB indeed had a valid ownership claim, it was the responsibility of its liquidator and not the applicant to take legal action.

[40] Since the liquidator of ARSB has not asserted any ownership rights over the properties, the applicant's attempt to independently pursue the claim is legally untenable. The lack of a formal claim from the ARSB liquidator further weakens the applicant's position.

[41] Based on these legal principles and factual findings, the court concludes that the PA does not confer proprietary rights to ARSB. The respondent's arguments regarding the PA's invalidity and ineffectiveness are well-supported by decided cases. Furthermore, as the liquidator of ARSB is the only proper party to assert any ownership claim over the shoplots, the applicant lacks the legal standing to bring this matter before the court.

[42] Accordingly, the court finds that the applicant has failed to meet the necessary criteria for leave to commence proceedings against the liquidator of FOSB. The application therefore stands dismissed.

ISSUE 3: IS THE APPLICANT ENTITLED TO FORM A COI?

[43] After reviewing issues 1 and 2, the court finds that the applicant has not demonstrated the necessity of forming a COI in FOSB's liquidation. The applicant's request for a COI to investigate alleged improprieties in FOSB's shareholding is barred by res judicata. Further, the claim over the 26 shoplots based on the PA lacks merit, as the PA does not confer ownership rights, the ARSB liquidator has not asserted any claim, and no legal proprietary transfer has occurred.

[44] The cases of *Affluent Freight Sdn Bhd* and *Tee Siew Kai*, firmly establish that a COI is not an automatic right but a discretionary measure to be summoned upon the request of a contributory or creditor. The respondent submits that such a request was made, and a vote was held among the creditors and contributories of FOSB. However, the majority of creditors and contributories opposed its formation. In accordance with r 119 of the Companies (Winding-Up) Rules 1972, a resolution is deemed passed when a majority in both number and value vote in favour of the decision. In this case, the decision against the formation of a COI was validly made and is binding.

[45] The applicant has provided no evidence to challenge the validity of the voting process or to demonstrate that the rejection of the COI was unreasonable. Furthermore, in *AA Sawit Sdn Bhd v Stable-Win Sdn Bhd* [2014] MLJU 1953; [2014] CLJU 667; [2014] AMEJ 0766; [2014] MLRHU 222, it was reinforced that a liquidator is vested with discretion in summoning meetings to consider the appointment of a COI, which is not a mandatory requirement unless explicitly requested and approved by creditors or contributories. Justice Gunalan Muniandy held this in *AA Sawit Sdn Bhd*:

> [18] For instance, it was alleged that he had failed to call for a meeting of creditors and contributories and had also failed to constitute a committee of inspection. *A plain reading of s 241(1), which is the governing provision on this issue, by the use of the word 'may', shows that the liquidator is vested with a discretion whether to summon separate meetings of the creditors and contributories to ascertain if the creditors and contributories require the formation of a committee of inspection. There is no mandatory requirement to summon separate meetings unless requested by any creditor or contributory*. As there was no evidence on record in the instant case that any creditor or contributory had requested any such meeting to be summoned, the allegation of breach of s 241(1), CA by the liquidator was unfounded and misconceived.

[46] The court further finds that the liquidation of FOSB is a solvent winding up with only three creditors and five contributories. As established in *Lim Boon Chuan @ Lim Ban Huat v Wonderful Castle Sdn Bhd (in liquidation) & Anor* [2019] 1 MLJ 270; [2019] 1 CLJ 65; [2018] 6 MLRA 372, a COI is typically necessary in cases involving a large number of creditors,

making it impractical for all to participate in liquidation proceedings. Given the small number of stakeholders in this case, forming a COI would serve no practical purpose.

[47] The court also takes into account that the applicant's primary reason for seeking the formation of a COI relates to allegations of improprieties in the allotment and transfer of shares in FOSB. However, these allegations have already been litigated and do not constitute valid grounds to revisit the issue through a COI. The applicant failed to provide any new evidence to justify re-examining these claims.

[48] The respondent has provided the applicant access to FOSB's books and records, ensuring transparency in the liquidation process. There is no evidence to suggest that the liquidator has refused, neglected, or failed to fulfil his statutory obligations under the Companies Act 2016.

[49] Given these findings, the court concludes that the applicant has not established a valid basis for leave to commence proceedings against the liquidator of FOSB.

ISSUE 4: DOES THE APPLICANT HAVE STANDING TO DEMAND DIRECTORSHIP CHANGES IN PUSPA SEPAKAT SDN BHD ('PSSB')?

[50] The court finds that the applicant has failed to establish any legal or factual basis to compel the liquidator of FOSB to remove a director of PSSB and appoint the applicant in their place. Section 206(3) of the Companies Act 2016, which the applicant relies on, merely prescribes the procedural requirement of issuing a special notice and passing a resolution for the removal or appointment of a director. It does not, in any way, grant the liquidator unilateral authority to effect such changes in PSSB's board of directors. The applicant has not provided any justification for why his appointment to PSSB is necessary to safeguard FOSB from pecuniary losses, an essential criterion for obtaining leave to initiate legal proceedings against the liquidator. In the absence of any legal duty on the liquidator to act in the manner sought and given the lack of evidence of financial harm to FOSB, the court finds no merit in the applicant's request.

[51] The claim that FOSB, as the largest shareholder in PSSB, holds the right to dictate director appointments is incorrect. FOSB holds an equal number of shares as another company, ZKS Serangkai Sdn Bhd, and does not have a controlling interest. Courts, including in *Chan Thiam Teng v Ban Swee Heng Sdn Bhd* [1992] 2 MLJ 583; [1992] CLJU 37; [1992] 4 MLRH 277, have consistently ruled that shareholders must follow proper legal channels rather than demand unilateral changes. The court in *Chan Thiam Teng* said:

> A resolution properly passed, which is so in this case, is binding on the defendants and until it is dissolved, cancelled or annulled, expressly or by implication, it bound the defendants on actions taken by its director who acted within the ambit of the resolution.

[52] As there is no prima facie evidence of mismanagement or financial harm to FOSB, the court dismisses the applicant's request, reaffirming that the liquidator has no obligation to interfere in PSSB's directorial affairs.

COURT'S DISCRETION IN GRANTING LEAVE

[53] The decision to grant leave is ultimately at the discretion of the court, which must assess the merits of the case based on available evidence. Courts have repeatedly emphasised the need for judicial caution in granting leave to prevent the liquidation process from being derailed by unnecessary litigation.

[54] In *Sarawak Timber Industry Development Corp v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584; [2004] AMEJ 0097; [2004] 2 MLRH 749, the court stated:

> there must be more than a mere allegation to move the court into granting leave to bring an action against a liquidator. An applicant who takes out misfeasance proceedings against a liquidator must show that he has sufficient interest in the outcome of the application.

In other words, courts should be reluctant to interfere with a liquidator's decisions unless there is clear evidence of bad faith or misconduct. The role of the court is to ensure that liquidation is conducted in a fair and orderly manner, not to entertain speculative claims.

[55] Liquidators are officers of the court and are entitled to judicial protection when carrying out their duties. Courts have recognised that permitting unfounded lawsuits against liquidators could lead to delays in winding up proceedings and increased costs, ultimately prejudicing creditors and contributories.

[56] This court is bound by the doctrine of stare decisis, which ensures consistency and certainty in judicial decisions. The Federal Court in *N Chanthiran a/l Nagappan* emphasises that adherence to binding precedent is mandatory. The requirement of obtaining leave before initiating proceedings against a liquidator is a long-established legal principle, and this court must apply it accordingly.

CONCLUSION

[57] The liquidator's conduct in the management of the company has been consistent with statutory requirements. The applicant has failed to provide credible evidence of bad faith, misconduct, or pecuniary loss to the company. Accordingly, the applicant's application is dismissed, and costs of RM2,000 awarded to the respondent. This judgment reinforces the importance of protecting the integrity of the liquidation process and ensuring that liquidators can discharge their duties without undue interference.

Application dismissed.

Reported by K Selvaraju